

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DACS TRUCKING CORP.	:	DETERMINATION
AND THEODORE PERSICO AND	:	
NICHOLAS COSTANZO, AS OFFICERS	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the period September 1, 1980	:	
through August 31, 1983.	:	

Petitioners, Dacs Trucking Corp., and Theodore Persico and Nicholas Costanzo, as officers, 6713 11th Avenue, Brooklyn, New York 11219, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1980 through August 31, 1983 (File Nos. 802153, 802154 and 802155).

A hearing was commenced before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on October 20, 1988 at 1:30 P.M. and continued to conclusion on March 16, 1989 at 1:15 P.M., with all briefs to be submitted by June 13, 1989. Petitioners appeared by Hyman R. Friedman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Kevin A. Cahill, Esq., of counsel).

ISSUES

I. Whether petitioners' sales of the service of carting construction debris constituted "maintaining, servicing or repairing real property" but not "interior cleaning and maintenance services...other than trash removal from buildings" so as to be taxable under Tax Law § 1105(c)(5), or whether such services were "adding to or improving such real property...by a capital improvement" so as to be excluded from the imposition of tax.

II. Whether an audit of the sales of the services of carting was valid when it was based on a test period of one month when records for the whole audit period were available.

III. Whether purchases at retail of fixed assets, repairs and fuel are taxable under the use tax (Tax Law § 1110) when made by a purchaser to perform services the sales of which are exempt from tax.

IV. Whether an audit of purchases at retail of repairs was valid when it was based on a test period of six months and the records for the whole audit period were available.

V. Whether an audit of purchases at retail of fixed assets and fuel which is based upon the books and records for the entire audit period is entirely correct in the face of errors found by petitioner.

VI. Whether penalties are due for the nonpayment of tax when the tax allegedly due has been held to be not due.

VII. Whether the failure to file returns and pay taxes that were due was due to reasonable cause and not due to willful neglect so as to justify a remission of penalties under Tax Law § 1145(a)(1) (former [ii]).

VIII. Whether the officers of Dacs are personally liable under Tax Law § 1133 for the taxes due from DACS because of a failure of DACS or the officers to cooperate in an audit.

IX. Whether a corporate officer who would be personally liable for the sales tax collected by a corporation is also liable for any use tax which is due from the corporation on the corporation's purchases.

X. Whether a corporate officer who is liable for a corporation's sales and use taxes under Tax Law § 1133 is also liable for delinquency penalties and interest for failure to file returns and pay taxes.

FINDINGS OF FACT

1. (a) Petitioner Dacs Trucking Corporation's business was carting. It would leave large containers at the site of a building to be loaded by its customer, a building contractor. To have the container hauled away, the contractor would telephone Dacs which would then send a truck to the site. The truck was specially designed to lift and carry these containers. Before the driver left the site, he would check the load and get a signed work order from the contractor's foreman. An empty container would typically be left at the site.

(b) Dacs owned three trucks each about 32 feet long with a hydraulic lift system to carry containers. It had 40 or 50 containers, called "roll off" containers, which are about 20 feet long with an open top. These could "slide" or "roll" off of, and on to, the trucks. These trucks were not closed and had no method of compressing their load. They could not be used for garbage.

(c) Dacs was licensed by the City of New York for the transportation of construction and demolition waste materials. The loads from Dacs's trucks would be dumped at dumps limited by New York City authorities to construction debris. For such dumping, the trucks had to carry medallions and have permits issued by the City.

(d) The employees of Dacs were members of local 282 of the teamsters union. They were confined to transporting construction debris. The carting of garbage and certain other types of waste was the jurisdiction of a different teamsters local.

(e) Petitioners Persico and Costanzo were both owners and officers of Dacs. Mr. Persico admits that he had duties with respect to the filing of income tax returns and that he hired the accountant for the corporation. Mr. Costanzo's duties are not clear from the record.

2. Dacs's officers testified that Dacs did not cart garbage, rubbish or trash; it carried only construction debris. The debris removed was bulky wood and concrete pieces. At each work site a building was either going up or coming down. The previous owner of the business never collected sales tax. No customer ever offered to pay the sales tax.

3. (a) Dacs was not registered as a sales tax vendor and has filed no sales tax returns. (At the time of the audit it was already out of business.)

(b) Dacs kept a general ledger, cash receipts journal, cash disbursements journal, sales journal, accounts receivable ledgers, a check book, invoices of fixed assets and fuel invoices.

4. Dacs purchased some goods on which it was charged and paid sales tax. Petitioners made no attempt to inquire into why such tax might not be due on other purchases Dacs made.

5. There is no evidence in the record that there was, as alleged by petitioners, an industry-wide custom and understanding that there would be no use tax on the purchase of goods to be used in performing nontaxable carting services or any other nontaxable services.

6. (a) A sales tax audit of Dacs was conducted. For this audit, gross sales were taken from the sales journals which had been found to be consistent with Federal income tax returns. Dacs and its accountant cooperated with the auditor during the audit.

(b) During the audit and after, petitioners objected to the "use and application" of the test period method being used. The objection made in particular was that the test period included some misposted items that the auditor was not allowing for. The auditor offered to do an audit utilizing the books and records for the entire audit period. Petitioner did not respond to this. The auditor then proceeded with his audit in part using test period methods.

(c) To test taxable sales, records of sales were examined for the month of September 1982. Thirty-seven invoices were found and gross sales from these totalled \$43,246.60. Of those, 19 totalling \$17,972.50 were determined to be taxable. Thus 41.56% of sales were found to be taxable. This ratio was applied to the gross sales for the audit period to determine the taxable sales for the audit period and a sales tax due was computed.

(d) For about half its sales Dacs had some evidence that the customer had a direct pay permit, a capital improvement certificate or an exempt organization certificate. Some of these documents had been given to petitioner at the time of the job. Others were given at Dacs's request at the time of the audit.

7. Records of repair expense purchases were examined for the six-month period June 1982 through November 1982. (Records were available for the full audit period.) It was found that 70.98% of purchases showed no evidence of any sales tax paid. In addition, it was found that 11.09% showed evidence of New Jersey tax paid but not New York tax.

8. Records of purchases of fixed assets were examined for the full three-year audit period. Of the 29 transactions examined, 22 were deemed to be subject to tax.

9. Records for fuel expense purchases were examined for the full three-year audit period. Where there was no showing that New York tax was paid, tax on these expenses was assessed. (Where New Jersey tax had been collected, a credit was given.)

10. (a) On February 20, 1985, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1980 through August 31, 1983 was issued to each petitioner. The tax due was stated as \$86,700.53, penalty of \$21,383.80 under Tax Law § 1145 and interest of \$34,228.07 for a total amount due of \$142,312.40. The tax due is comprised of \$54,382.23 in sales tax on additional gross sales, \$19,295.87 for use tax on fixtures and equipment, \$11,003.36 for use tax on repair expenses and \$2,019.87 for use tax on fuel expense.

(b) In recommending the penalty, the auditor stated that the penalty was recommended due to "the large number of missing certificates and missing invoices, also vendor is not registered, fails to register when requested and has filed no tax returns."

(c) The auditor's report stated that:

"Officer assessments should also be issued due to the overall lack of cooperation of the vendor and the large amount of tax in dispute."

11. (a) Petitioners' own review of the repair audit has revealed some mistakes in that audit. In 11 transactions they found that the postings in Dacs's books were not for repairs. These totaled \$7,526.06. They reduce the error rate found by the auditor from 70.98% to 46.15% and the tax due for the audit period from \$11,003.36 to \$8,412.48.

(b) Petitioners' own review of the fixed asset audit revealed two mispostings and four transactions where sales tax was paid to the vendor. These totaled \$101,531.80, and reduce the tax due from \$19,295.07 to \$10,951.20.

(c) Petitioners' review of the fuel audit turned up four mispostings totalling \$10,874.95 (after reduction by Federal excise tax). They reduce the tax due from \$2,019.87 to \$1,130.09.

CONCLUSIONS OF LAW

A. Petitioners' sales are exempt from tax. The services which Dacs performs, carting services, can constitute a capital improvement to real property so long as the end result of the service is such a capital improvement (20 NYCRR 527.7[b][4]). It has been held by the courts that carting services during the construction or demolition of a building are capital in nature and are excluded from sales tax (Matter of Building Contractors Association, Inc. v. Tully, 87 AD2d 909). In this case, it is clear that petitioners' services were capital in nature. There was testimony that Dacs's employees and its customers' employees all thought they were involved in construction and demolition and not in mere trash removal. The Division of Taxation did not rebut these statements with evidence from even one worksite that repairs might be involved. The fact that Dacs does not obtain exemption certificates from its customers is not relevant. There is no requirement in the statute for such certificates for items excluded from tax as distinguished from items specifically exempted from tax. Even where a certificate is required under Tax Law § 1132 for an exemption the lack of one "does not necessarily mean that the vendor is to be held liable for taxes it failed to collect from the purchaser" (20 NYCRR § 532.4[b][4][v]).

B. The audit of taxable sales is in any event invalid. The audit is based upon a test period of one month with the ratio of taxable sales for that one month being projected over the entire three-year audit period. Dacs, however, had its books and records for the entire audit period. This is in effect admitted by the auditor in his offer to do an audit using records for the entire audit period. The auditor could have done an item-by-item audit, but failed to do so. Such test period audits are invalid unless expressly asserted to by the taxpayer (Matter of Adamides v. Chu, 134 AD2d 776, lv denied 71 NY2d 806; Matter of King Crab Restaurant, Inc. v. Chu, 134 AD2d 51; Matter of Cedar Brook Contracting Corp., Tax Appeals Tribunal, September 14, 1989).

C. The purchases are subject to tax. Section 1110 of the Tax Law imposes a use tax for the use "of any tangible personal property purchased at retail". Dacs's purchases are in effect purchased at retail. It is clear that, as already decided, Dacs's services do not come within Tax Law § 1105(c)(5) and are therefore not taxable. They are therefore not services subject to tax. The purchases of property and services necessary to perform these services are purchases other than for use in performing taxable services and therefore are purchases at retail under Tax Law § 1101(b)(1). Such purchases are subject to use tax and petitioner's argument to the contrary is rejected.

D. The use tax audit of repair purchases is invalid for the same reasons as those given for the invalidity of the audit of sales (see Conclusion of Law "B").

E. The audits of fixed asset and fuel purchases were performed by an examination of Dacs's books for the entire three-year audit period. Petitioners' objections to mistakes in those audits are credible and entirely acceptable. It is of no consequence that the mistakes in the audits were occasioned by mispostings in petitioners' books and that the auditor may not have been "at fault" in relying on the mispostings. The taxpayer can always present better evidence and correct mistakes. Therefore, the tax due on fixed assets and fuel purchases is to be adjusted in accordance with Finding of Fact "11".

F. The calculation of the penalty is based upon the amount of tax due (Tax Law § 1145[a][1][i]). Thus, in this case, there will be no penalty on any amount of sales taxes on the carting service, purchases at retail of repairs, or the portion of the purchases at retail of fixtures and fuel which have been found to be in error. The penalty is thus imposed on only the portion of the purchases at retail of fixtures and fuel which have been found to be taxable.

G. (1) Dacs was required to file returns showing use tax due. The Sales and Use Tax Law states that "every vendor of tangible personal property or services" is a "person required to collect tax" (Tax Law § 1131[1]). This, it should be noted, is not restricted to vendors who are taxable. Such person must register with the Tax Commissioner (Tax Law § 1134[a][1][i]). Having registered, such person is then required to file sales tax returns (Tax Law § 1136[a]). Even if DACS has no sales, it would have to file a quarterly return (Tax Law § 1136[a]) and such return shall contain all information necessary for the proper administration of the sales and use tax (Tax Law § 1136[d]). This return must include the amount of purchases subject to use tax (20 NYCRR 533.3[d][3][iv]). When such return is filed, the tax must be paid (and this includes use tax) (Tax Law § 1137[a][ii]).

(2) The penalties imposed for not filing returns or paying taxes due may be remitted if the failure or delay to file or pay tax is due to "reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1] [former (ii)]). The reasons advanced by Dacs for nonpayment of the use taxes due do not show reasonable cause. Regulations for the application of this standard were set forth in the years in question in 20 NYCRR former 536.1(b)(6). These state grounds for reasonable cause not relevant here and then state a further ground to be:

"Any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willful intent to disobey the taxing statutes. Past performance will be taken into account. Ignorance of the law, however, will not be considered reasonable cause."

Dacs claims it was ignorant of its duty to pay tax on its purchases because it was misinformed by industry sources that it was exempt. Yet even if Dacs could show such industry sources, and it has not, that would not be sufficient grounds to excuse Dacs ignorance of the law. Furthermore, at least some of Dacs's purchases were billed to Dacs with tax paid on those bills. Dacs was therefore on notice of possible sales tax liabilities on other purchases such as out-of-state purchases in issue in this case. Yet Dacs did nothing to inquire into its use tax liabilities.

H. Officer assessments were justified in this case simply because the corporation was out of business. Whether such assessments would be justified solely because of an alleged failure of cooperation of the corporation or of its officers to facilitate the audit is academic.

I. An officer of a corporation may be held personally liable not only for the sales taxes due and unpaid from the corporation, but also for use taxes which the corporation should pay on

its own purchases made in New Jersey and brought into New York State. At least this is the clear implication of a recent case decided by the Tax Appeals Tribunal (Matter of Martin Laschever, Tax Appeals Tribunal, March 23, 1989) which of course, I must follow. That case involved an officer's liability for sales tax (not use taxes) which should have been paid to the vendor by a customer corporation. The Tribunal, in holding the officer of the customer corporation personally liable, referred to the statutory framework concerning such liability. That liability is imposed by the first sentence of Tax Law § 1133(a) and is imposed on every "person required to collect any tax." A "person required to collect any tax" is defined in Tax Law § 1131(1) to include any officer of a corporation who is under a duty to comply "with any requirement" of the sales and use tax. Such a duty, according to the Tribunal, is not to be limited to the duty to collect a tax but can and does extend to the duty to file returns for and pay tax. Such a duty is found under Tax Law § 1133(b) to be imposed on every purchaser of goods (a "customer") who has failed to pay the sales tax to a vendor. The petitioner in the Laschever case was such a purchaser. In the instant case, the petitioner corporation has made many purchases in New Jersey and the tax that is due is a use tax under Tax Law § 1110. Yet the corporation is also under a duty to file a return and pay use tax. This duty, for a person such as Dacs which is a registered vendor, is provided in Tax Law § 1136(a). The regular sales tax return must include use taxes due. Thus it follows that the officers of Dacs are personally liable for the use tax deficiency asserted against Dacs.

J. The officers of Dacs are not liable for the penalty imposed under Tax Law § 1145 on Dacs. Since Tax Law § 1145 also applies to interest the officers are similarly not liable for interest imposed on Dacs. To continue the analysis in paragraph "I" above of an officer's personal liability we must note that the personal liability imposed by Tax Law § 1133(a) is for "the tax" imposed. The term "tax" in the Sales and Use Tax Law clearly does not include penalties. The term is defined in Tax Law § 1131 subd (3) to include only taxes imposed under Tax Law §§ 1105 (sales tax) and 1110 (use tax) and any further amounts due with the return (i.e., excess collections under Tax Law § 1137[a][iii]). Also it is noted that when the law refers to tax and penalty, both terms are used (see Tax Law §§ 1139[a], [c]; 1141[a], [b]) and that the determination of tax due in this case refers to the two separately and the combined amount is referred to simply as the "amount due". Thus, the restriction of personal liability of an officer to the "tax" imposed on the corporation is thus clearly intended to exclude liability for the penalty (and interest). This same result has been reached in the case of a purchaser of a business under Tax Law § 1141(c) pertaining to the personal liability of a purchaser of a business for the sales taxes which the vendor was under an obligation to collect from its customers (Matter of Velez, ___ AD2d ___, [3d Dept November 9, 1989]).

K. The petition of Dacs Trucking Corp. and Theodore Persico and Nicholas Costanzo, as officers is granted to the extent indicated in Conclusions of Law "A", "B", "D", "E", "F" and "J"; the Division of Taxation is directed to modify the notices of determination and demands for payment of sales and use taxes due issued February 20, 1985 accordingly; and, except as so granted the petition is in all other respects denied.

DATED: Troy, New York
February 8, 1990

/s/ Nigel G. Wright
ADMINISTRATIVE LAW JUDGE